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14 GOOGLE INC.

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 ORACLE AMERICA, INC.,

19 Plaintiff,

20 v.

21 GOOGLE INC.,

22 Defendant.

Case No. 3:10-cv-03561 WHA

**GOOGLE INC.'S MOTION TO EXCLUDE
CERTAIN WITNESSES FROM THE
DAMAGES PHASE**

Dept.: Courtroom 8, 19th Floor
Judge: Hon. William Alsup

1 In its motion for summary judgment on Oracle's claims for disgorgement for Google's use
 2 of nine lines of rangeCheck code and eight decompiled test files, [Dkt. 1125], Google made the
 3 point that Oracle could not offer any additional evidence, beyond the legally insufficient proof
 4 that is in the record already, to show a causal nexus between the infringed works and any revenue
 5 made by Google related to the Android platform. In its opposition, [Dkt. 1135], Oracle did not
 6 answer that question or give the Court any indication what its damages case would look like. But
 7 Oracle's witness disclosures to Google for phase three, [Dkt. 1127], make Oracle's plans clear:

- 8 • Oracle intends to call—yet again—Google's most senior executives, Chief Executive
 9 Officer **Larry Page** and Executive Chairman **Eric Schmidt**, neither of whom has any
 10 knowledge about rangeCheck or the test files or the extent, if at all, to which those files
 11 contributed to Google revenues related to the Android platform.
- 12 • Oracle intends to call—yet again—**Tim Lindholm**, who never did a minute of technical
 13 work on Android and has no knowledge about rangeCheck or the test files or the extent, if
 14 at all, to which those files contributed to Android-related revenues.
- 15 • Oracle plans to recall its technical expert, **Dr. John Mitchell**, who conducted no technical
 16 study of the qualitative or quantitative importance of rangeCheck or the decompiled test
 17 files and expressed no opinion on those issues in any of his reports.

18 As it has done throughout this trial, Oracle has designated dozens of exhibits for possible
 19 use with the fact witnesses, none of which has anything to do with rangeCheck or the test files,
 20 much less the extent to which those files contributed to Google profits. Instead, the designated
 21 documents are mostly Google financial projections with large numbers and historical documents
 22 relating to whether Google ought to take a license from Sun or Oracle. Obviously, none of these
 23 documents discuss revenue expected from, or the need to take a license for use of, rangeCheck or
 24 the test files. They are irrelevant to any issue to be decided in the damages phase. Oracle also
 25 would like to ask these witnesses questions about Android's gross revenues generally, but Oracle
 26 should not be permitted to offer evidence of Android's gross revenues unless and until it has
 27 shown a causal link between the infringing works and those revenues (which Oracle will not be
 28 able to do). Even then, these issues are best addressed to Android business unit head Andy Rubin
 and Android financial analyst Aditya Agarwal, both of whom are also on Oracle's witness list.
 Mr. Page, Dr. Schmidt, and Mr. Lindholm did not prepare Google's Android financials and are in
 no position to explain how those numbers were calculated.

Oracle's strategy is abusive and oppressive, and the Court should put a stop to it. Oracle should not be permitted to drag into court yet again Google's senior management, who already testified at length in the copyright phase, and Mr. Lindholm, who has never done any technical work for Android, RT 863:7-16 (Lindholm), and has already testified twice during this trial, including in the copyright phase. Oracle's only possible reasons for calling these witnesses yet again are to put irrelevant large numbers into the public record and to harp on so-called "licensing" documents that have nothing to do with the minuscule works that have actually been found to infringe Oracle's copyrights. (With respect to the licensing documents, there is no evidence or suggestion that anyone who wrote or received them had any idea that rangeCheck or the eight test files were in Android.) This Court has made clear that the parties are barred from presenting cumulative testimony already offered in prior phases. Unless Oracle can proffer some legitimate basis for believing these witnesses have some relevant testimony to offer related to the limited scope of the damages phase, the Court should exclude them from that phase.¹

Similarly, Oracle has announced plans to call Dr. Mitchell, but Dr. Mitchell has nothing to say about the qualitative or quantitative importance of rangeCheck or the test files beyond what he already said in phase one. In his opening report, he opined only that rangeCheck likely had been copied, was called nine times by "other methods in the [TimSort] class," and likely had been used on Android phones. Mitchell Opening Report ¶¶ 233-240. As to the decompiled files, he opined only that it was no accident that they were the same as the Java files. *Id.* ¶¶ 241-248. He later opined that Google's use of the structure, selection, and organization of the API packages in some Java core libraries had increased consumer demand for Android, *id.* ¶¶ 253-274, but he never discussed rangeCheck or the decompiled files in this section, much less explained how those files could have had an effect on Android's revenues. In the relevant section of his opposition report, Mitchell Opp. Report ¶¶ 83-100, Dr. Mitchell stated only what he has already said at trial: that rangeCheck performs a parameter test, *id.* ¶¶ 85-86, and that the testing function

¹ Moreover, Eric Schmidt has long-standing plans to be out of state during the damages phase; he has business on the East Coast this week, and then will be out of the United States for the remainder of May 2012.

1 enabled by the decompiled files was “important in some way to Google’s Android development
 2 process.” *Id.* ¶¶ 94-95. His reply report offered nothing new, only referring back to the
 3 opposition report. Mitchell Reply Report ¶ 32. Simply put, he has no damages-related opinions
 4 to offer about the infringing works. To the extent Oracle plans to call Dr. Mitchell in phase three
 5 to opine that Google willfully copied rangeCheck and the test files, he already offered those
 6 opinions in phase one. RT 1255:16-21 (Mitchell on copying of rangeCheck); *id.* at 1259:16-
 7 1262:1 (Mitchell on copying of test files). Because he has already stated all of his disclosed
 8 opinions regarding the infringing works, it would be cumulative for Oracle to recall him to testify
 9 in the damages phase.

10 For all the foregoing reasons, and most importantly because the damages phase will focus
 11 only on Google’s revenues and profits linked to the infringing works, the Court should exclude
 12 Mr. Page, Dr. Schmidt, Mr. Lindholm, and Dr. Mitchell from the remainder of trial.

13
 14 Dated: May 14, 2012

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 18 GOOGLE INC.
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